COURT OF APPEALS
DECISION
DATED AND FILED

March 18, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3232

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

HOWARD D. PLATT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County: JOHN R. RACE, Judge. *Affirmed.*

BROWN, J. Howard D. Platt appeals from the trial court's order revoking his driving privileges following a finding that his refusal to submit to chemical testing was unreasonable. He argues that the trial court erred because: (1) the officer did not articulate a reasonable suspicion to stop his vehicle, (2) the officer did not have probable cause to arrest him for driving while intoxicated, and

(3) the officer did not fully inform him of his rights and the consequences of refusing to submit to chemical testing. We disagree and affirm.

The pertinent facts are as follows. Officer Kenneth Mulhollon testified that just before midnight on June 15, 1997, he was driving northbound on Walworth Avenue in his squad car when he observed a black colored vehicle driven by Platt traveling westbound through a bank parking lot. When the vehicle exited the parking lot, crossing Walworth Avenue, it failed to yield the right-of-way to Mulhollon and then continued westbound on Cherry Street. After pursuing the vehicle for approximately two blocks, Mulhollon stopped the vehicle and approached the driver's side of the car.

Mulhollon testified that he then asked Platt to roll down the driver's side window; Platt rolled down the rear driver's side window of the vehicle. Mulhollon again asked Platt to roll down his window, which he did. Mulhollon testified that he immediately noticed a strong smell of intoxicants and that Platt's eyes were bloodshot and glassy. He also testified that because it was raining quite heavily and because he noticed a large, black Rottweiler in the back seat, he asked Platt to roll up the rear window, which Platt did.

Mulhollon asked Platt for identification. He testified that Platt exhibited poor coordination in producing his driver's license. Mulhollon explained that Platt made two attempts to grab the license from his wallet, and he compared Platt's movements to those of a person whose hands are extremely cold and cannot grasp or move things as directed. Mulhollon then asked Platt if he had been drinking, and Platt responded that he had not. However, when Mulhollon told Platt that he could smell a strong odor of intoxicants, Platt responded "[O]kay, I had a few."

Upon the arrival of another officer, Mulhollon asked Platt to step out of his vehicle. Platt had to grasp the driver's side door with both hands to balance himself while exiting the vehicle. Moreover, when he stood up he continued to lean quite heavily on the door while swaying back and forth. Mulhollon testified that because Platt smelled of intoxicants, exhibited poor coordination and balance, and had bloodshot, glassy eyes, he decided that Platt was under the influence of intoxicants and placed him under arrest.

Mulhollon then placed Platt in a squad car and took him to the Williams Bay Police Department, where Mulhollon and another officer decided to administer field sobriety tests in the garage of the police department. During the first test, however, Platt lost his balance, began to stumble and needed assistance to keep from falling. Mulhollon decided against further testing because he was afraid that Platt would fall and injure himself on the concrete floor of the garage.

Afterwards, Mulhollon issued Platt a citation for operating a vehicle while under the influence of an intoxicant. He then read Platt section A of the Informing the Accused form and asked if he would submit to a chemical test of his blood. He did not read Platt section B of the form, which applies to holders of commercial driver's licenses. Mulhollon testified that he asked Platt four times if he would submit to the test. Platt did not respond to the first two requests, and after the third, he asked if he could call an attorney. Mulhollon explained to Platt that he would be allowed to phone an attorney from the jail and that if he failed to respond to the request, it would be marked as a refusal on the form. Mulhollon testified that because he received no response to a fourth request to submit to chemical testing, he marked the box indicating that Platt had refused the test.

At the refusal hearing, the State introduced the testimony of Mulhollon. Platt did not enter any evidence on his behalf. Based on Mulhollon's testimony, the trial court found that the stop was reasonable, there was probable cause for the arrest, Platt was properly read the Informing the Accused form and Platt refused to submit to chemical testing. The trial court then found that Platt's refusal was unreasonable and revoked his driver's license for a period of two years. Platt appeals.

First, Platt contends that the officer did not articulate a reasonable suspicion for stopping his vehicle. We disagree. Under certain limited circumstances the police may stop persons in the absence of probable cause. *See* ***United States v. Hensley,*** 469 U.S. 221, 226 (1985). In particular, police officers may briefly stop a moving vehicle to investigate a reasonable suspicion that its occupants are involved in criminal activity. *See* ***id.*** "The test is an objective test. Law enforcement officers may only infringe on the individual's interest to be free of a stop and detention if they have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime." ***State v. Guzy***, 139 Wis.2d 663, 675, 407 N.W.2d 548, 554 (1987). An "inchoate and unparticularized suspicion or 'hunch'" will not suffice. ***Terry v. Ohio,*** 392 U.S. 1, 27 (1968).

The reasonableness of an investigative stop depends upon the facts and circumstances that are present at the time of the stop. *See* ***Guzy,*** 139 Wis.2d at 679, 407 N.W.2d at 555. We will not overturn the trial court's findings of fact unless they are against the great weight and clear preponderance of the evidence. *See* ***id.*** at 671, 407 N.W.2d at 552. Whether the facts as found by the trial court satisfy the constitutional requirement of reasonableness, however, is a question of law which we review independently of the trial court. *See* ***id.***

We conclude that Mulhollon articulated a reasonable suspicion that Platt had committed a traffic offense and was therefore justified in stopping Platt's vehicle. Mulhollon testified that as he drove northbound on Walworth Avenue, he observed Platt's vehicle driving westbound through a parking lot. When Platt exited the parking lot, he failed to yield to the officer's car, drove across Walworth Avenue and then continued westbound on Cherry Street. Thus, the record supports the trial court's finding that Platt failed to yield the right-of-way when he exited the parking lot and crossed Walworth Avenue. Moreover, we hold that Mulhollon articulated a reasonable suspicion that a crime had been committed when he testified that Platt failed to yield the right-of-way when he exited the parking lot. We affirm the trial court on this issue.

Second, Platt argues that Mulhollon did not have probable cause to arrest him for driving while under the influence of an intoxicant. Probable cause generally refers to "that quantum of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime." ***State v. Nordness,*** 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). It exists where the totality of the circumstances within the arresting officer's knowledge at the time of the arrest would lead a reasonable police officer to believe that the defendant was operating a motor vehicle while under the influence of an intoxicant. *See* ***id.*** Probable cause does not require "proof beyond a reasonable doubt or even that guilt is more likely than not." ***State v. Babbitt,*** 188 Wis.2d 349, 357, 525 N.W.2d 102, 104 (Ct. App. 1994). Whether an officer had probable cause to arrest is a question of law which we review without deference to the trial court. *See* ***id.*** at 356, 525 N.W.2d at 104.

Our review of the record indicates that under the totality of the circumstances, a reasonable officer would believe that Platt was driving while

under the influence of an intoxicant.[1] Mulhollon testified that Platt failed to yield the right-of-way when he exited the bank parking lot. Furthermore, Platt rolled down the wrong window, smelled strongly of intoxicants and had bloodshot, glassy eyes. Platt admitted that he "had a few" drinks that evening. He had difficulty grasping his driver's license, and he also exhibited poor balance and coordination by having to place both of his hands on the car door when he exited the car, by continuing to lean heavily on the car door and by swaying back and forth when he stood up.

Platt, however, argues that under ***State v. Swanson***, 164 Wis.2d 437, 475 N.W.2d 148 (1991), police officers must perform a field sobriety test to establish probable cause. He is wrong. ***Swanson*** implies that for the police to establish probable cause a field sobriety test is generally necessary to determine whether the consumption of alcohol sufficiently impaired the suspect's physical capacities. *See* ***id.*** at 453 n.6, 475 N.W.2d at 155. Unexplained erratic driving, the smell of intoxicants and the approximate time of night of the stop only established a reasonable suspicion that the suspect was intoxicated; these factors did not establish probable cause. *See* ***id.***

We have previously held, however, that "[t]he ***Swanson*** footnote does not mean that under all circumstances the officer must first perform a field sobriety test, before deciding whether to arrest for operating a motor vehicle while under the influence of an intoxicant." ***State v. Wille,*** 185 Wis.2d 673, 684, 518 N.W.2d 325, 329 (Ct. App. 1994). Here, the officer's decision to arrest was not

[1] The State concedes, as it must, that because Platt was already under arrest when Mulhollon administered a field sobriety test in the garage of the police station, the result of this test cannot be used to establish probable cause to arrest.

based solely on his observations of Platt's driving, the smell of intoxicants, Platt's bloodshot, glassy eyes and the time of the stop. Mulhollon testified that he observed Platt exhibit poor hand/eye coordination, that Platt was unable to exit the car without the aid of the car door, that Platt was unable to stand up without leaning on the car door and that even then he continued to sway back and forth. Given these circumstances, Mulhollon did not need a field sobriety test to establish probable cause as to whether Platt was operating a motor vehicle while under the influence of an intoxicant. We therefore reject Platt's argument that Mulhollon did not have probable cause to arrest him.

Finally, Platt argues that because Mulhollon did not read him section B of the Informing the Accused form (which applies only to commercial motor vehicle drivers and license holders), the officer failed to fully inform him of his rights and the consequences of his refusal as required under § 343.305(4m), STATS. Whether Platt was properly informed of his rights under § 343.305 is a question of law which we review without deference to the trial court. *See* ***State v. Piskula,*** 168 Wis.2d 135, 138, 483 N.W.2d 250, 251 (Ct. App. 1992).

Platt does not claim that he possesses a commercial driver's license and, therefore, was not fully informed of all of his rights. Instead, Platt's argument is premised on a belief that once it is shown that an officer did not read section B of the Informing the Accused form to the defendant, the burden is on the State to show that the defendant does not have a commercial driver's license. Therefore, concludes Platt, because the State did not enter evidence showing that he had no commercial driver's license, he was not properly informed under § 343.305, STATS., and he cannot be penalized for refusing the chemical test.

The purpose of the Informing the Accused form is to inform the accused of the rights and penalties relating to him or her under § 343.305, STATS., so that he or she can make an informed decision. *See* ***Piskula***, 168 Wis.2d at 140-41, 483 N.W.2d at 252. Here, Mulhollon read Platt section A of the form, which lists all the rights and penalties under § 343.305(4). Although Platt was not read the rights and penalties relating to holders of commercial vehicle licenses under § 343.305(4m), he was neither driving a commercial vehicle when stopped nor did he ever assert that he holds a commercial driver's license. Platt, not the State, has a duty to show why he needed the information under § 343.305(4m) to make an informed decision. He failed to do so. We therefore conclude that Platt was informed of all of the rights and penalties relating to him under § 343.305(4) when the officer read him section A of the Informing the Accused form. Platt had all of the statutorily designated information which he needed to make an informed decision. Thus, because Platt was informed of all of the statutorily designated information he needed to make an informed decision, we reject his argument.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.